NO. 82-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,

APPELLANT

VS.

DIAMOND M DRILLING COMPANY,

APPELLEE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE MISSISSIPPI TRIAL LAWYERS ASSOCIATION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982 NO. 82-1032

HERMAN J. DOUCET,
APPELLANT

VS.

DIAMOND M DRILLING COMPANY,
APPELLEE

MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE MISSISSIPPI TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT, HERMAN J. DOUCET

Pursuant to Rule 36.1 of the Rules of this Court, the Mississippi Trial Lawyers Association hereby moves for leave of this court to file this Brief Amicus Curiae in support of the appellant, Herman J. Doucet.

The grounds for this motion are as follows:

1) Appellee, Diamond M Drilling Company, has refused written consent to the filing of this amicus brief. Accordingly, this motion is being filed pursuant to Rule 36.1 of the Rules of this Court.

2) This case involves the question of what standard of review should be applied by a federal court of appeals reviewing the grant or denial of a judgment n.o.v. in a

longshoreman's third-party negligence action against a vessel owner pursuant to 33 U.S.C. §905(b).

3) The Mississippi Trial Lawyers Association is principally composed of attorneys representing plaintiffs, many of whom are personal injury litigants, and many of whom will be affected by the outcome of this case.

4) The Mississippi Trial Lawyers Association believes that litigants in 33 U.S.C. §905(b) actions should receive a uniform standard of review of grants or denials of judgments n.o.v. throughout the circuit courts of appeals, and that this standard should be consistent with the Seventh Amendment of the United States Constitution.

Accordingly, the Mississippi Trial Lawyers Association hereby moves this Court for leave to file the following amicus brief in support of the position of appellant.

Respectfully submitted:

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AMICUS CURIAE BRIEF

STATEMENT OF INTEREST OF AMICUS CURIAE

The Mississippi Trial Lawyers Association is a non-profit organization composed of approximately eight hundred members of the Mississippi State Bar Association, practicing within the territorial jurisdiction of the United States Court of Appeals for the Fifth Circuit.

The filing of this brief reflects the concern of *amicus* that two of the stated purposes of the Association, to preserve the adversary system of justice and to protect the right of trial by jury, of those who are damaged in person and in property, will be subverted if this Court does not resolve the conflicting standards of review utilized by various federal courts of appeals reviewing grants and denials of judgments n.o.v. in 33 U.S.C. §905(b) actions.

Amicus has been denied the written consent of

respondent, Diamond M Drilling Company, to file this brief.

SUMMARY OF THE ARGUMENT

Appellant in this action contends that the Fifth Circuit Court of Appeals applied an improper standard of review when it reversed the trial court's denial of judgment n.o.v. in this case. *Amicus* will argue in this brief that this court should provide the federal courts of appeals with a uniform standard of review to be applied to grants or denials of judgments n.o.v. in longshoremen's negligence actions pursuant to 33 U.S.C. §905(b).

ARGUMENT

I. CONFLICTING STANDARDS UTILIZED BY CIRCUIT COURTS OF APPEALS REVIEWING GRANTS OR DENIALS OF JUDGMENTS N.O.V. IN 33 U.S.C. §905(b) NEGLIGENCE ACTIONS OBSTRUCT BOTH CONGRESS' INTENT OF UNIFORMITY IN THE APPLICATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND THE UNIFORM APPLICATION OF THE NEGLIGENCE STANDARD PROVIDED BY THIS COURT IN *SCINDIA STEAM NAVIGATION CO., LTD., V. DE LOS SANTOS.*

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950 (hereinafter "the Act"), provides in its §905(b) (hereinafter the "§905(b) action") that longshoremen may sue a vessel owner for injury "...caused by the negligence of a vessel". The Congress' primary objective in amending the Act in 1972 with regard to third-party actions against a vessel was to eliminate the

absolute liability of the vessel towards the longshoreman on the basis of "unseaworthiness", a "non-delegable duty" or the like.[1] However, "persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel...."[2] In the leading Supreme Court decision on §905(b) actions, *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), this Court stated that "[the longshoremen's] right to recover from the shipowner for negligence was preserved in §905(b), which provided a *statutory negligence action against the ship* ..."[3] (emphasis added). Therefore, as the Senate Committee on Labor and Public Welfare (hereinafter "the Senate Committee") stated in its Senate Report, "the vessel's liability is to be based on its own negligence...."[4]

Scindia, supra, adopted a standard of negligence to be applied in §905(b) actions.[5] This Court "accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation."[6] Although this

[1] S. Rep. No. 92-1125 92nd Congress, 2d Session, at 10 (1972) (hereinafter "Senate Rep.") (as noted in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), H. R. Rep. No. 92-1441 92nd Congress, 2d Session (1972) is in all relevant aspects identical to the Senate Report.)

[2] Senate Rep., at 10.

[3] 451 U.S., at 165.

[4] Senate Rep., at 11.

[5] 451 U.S., at 167, 172, 175, 176.

[6] *Id.*, at 167.

statement of the standard of negligence dealt with cargo operations, it should be applicable to all longshore workers within the coverage of the Act, (for example, a casing crew member, such as Doucet) where the vessel "actively involves itself" in the longshore operations and "fails to exercise due care to avoid exposing longshoremen to harm from hazards...."[7] occurring during such operations.

However, *Scindia's* holding, intended to provide a uniform standard of negligence in §905(b) actions, is emasculated when the various federal courts of appeals apply diverse standards of review to the sufficiency of the evidence necessary to establish negligence. Such a haphazard application of varying standards of review to the *Scindia* negligence standard also violates the policy of the Congress in enacting the 1972 Amendments to the Act. The Senate Committee stated its intent "that the negligence remedy authorized in the bill shall [not] be applied differently in different ports depending on the law of the State in which the port may be located."[8] Such legal questions brought under the Act "shall be determined as a matter of federal law."[9] The Congress has thus stated its intent that application of the Act shall be uniform throughout the scope of its coverage.

A. CONFLICTING STANDARDS OF REVIEW ARE UTILIZED BY VARIOUS CIRCUIT COURTS OF APPEALS REVIEWING GRANTS OR DENIALS OF JUDGMENTS N.O.V. IN §905(b) ACTIONS.

At least three different standards of review are

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[7] *Id.*

[8] Senate Rep., at 12.

[9] *Id.*

applied in §905(b) actions by the federal courts of appeals.

Doucet v. Diamond M Drilling Co., 683 F.2d 886 (5th Cir. 1982) is the latest enunciation of the standard of review utilized by the Fifth Circuit in §905(b) actions. The *Doucet* court stated that the rule of *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) concerning the appellate "standard of review for the sufficiency of the evidence in such cases" was "firmly established".[10] In the second footnote of its opinion, the *Doucet* Court stated that:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider *all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion...A mere scintilla of evidence is insufficient to present a question for the jury.* The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (footnote omitted)."[11] (emphasis added).

Ironically, the Fifth Circuit itself appears to apply its own *Boeing* standard of review for §905(b) actions dif-

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[10] 683 F.2d, at 880 quoting *McCormack v. Noble Drilling Corporation*, 608 F.2d 169 (5th Cir. 1979).

[11] *Id.*, at 889 fnt. 2.

ferently on different occasions. Contrary to the above *Doucet* court's reading of *Boeing*, the Fifth Circuit panel in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981) citing *Boeing*, apparently examined only the evidence supporting the jury's verdict in a §905(b) action, i.e. the evidence in support of the non-movant.[12] *Lemon* reversed the trial court's grant of judgment n.o.v. for the defendant vessel owner. It seems, then, that the Fifth Circuit has rendered conflicting decisions applying its own standard of review, that stated in *Boeing Company v. Shipman, supra.*

The Second Circuit's standard for the review of the sufficiency of the evidence in §905(b) actions is at odds with the Fifth Circuit standard. In *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163 (2d Cir. 1980) the Court states that:

> "The trial court should grant a judgment n.o.v. only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him."[13]

Mattivi, applying the above standard to a §905(b)

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[12] "In this case, the jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo and that the negligence proximately contributed to the plaintiff's injury. *The evidence supporting their verdict [for the non-movant]* included the fact that the chief mate had actual knowledge of the improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff...." (emphasis added). 656 F.2d, at 116.

[13] 618 F.2d, at 168.

action, relies upon Judge Anderson's opinion in *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957 (2d Cir. 1970), *cert. denied*, 400 U.S. 833, 91 S.Ct. 67, 27 L.Ed.2d 65 (1970).

Armstrong affirmed a judgment n.o.v. in favor of a defendant shipowner and agent in a negligence action brought pursuant to the Jones Act, 46 U.S.C. 688 et seq. (hereinafter "the Jones Act"). Affirming the trial court, Judge Anderson stated that "the evidence must be viewed in the light most favorable to the party other than the movant. The motion [for directed verdict or judgment n.o.v.] will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant ...' "[14] and that where " 'it is apparent that the jury's finding that some act of negligence was performed by the plaintiff's shipmates was sheer surmise and conjecture' "[15] the verdict of the jury will be set aside. Thus, the *Mattivi* Court, reviewing a §905(b) action, looked to a Jones Act action for the standard of review to be used to determine the sufficiency of the evidence. *Mattivi* applied the stricter standard of review traditionally used in Jones Act actions which requires a "complete absence of probative evidence to support a verdict for the non-movant..."[16] before a jury verdict will be set aside.

Jones Act actions are based on a statutory negligence cause of action,[17] as are §905(b) actions. The *Mattivi* Court, therefore, seems to equate the standard of review

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[14] *Armstrong v. Commerce Tankers Corp., supra*, at 959.

[15] *Id.*, at 960.

[16] *Id.*, at 959.

[17] 46 U.S.C. §688.

for the sufficiency of evidence in §905(b) actions with those of Jones Act actions (both statutory negligence actions).[18] The Fifth Circuit, on the other hand, applies two distinct standards when reviewing the sufficiency of the evidence in §905(b) actions and in Jones Act actions. As previously stated, the Fifth Circuit standard of review in §905(b) cases is "firmly established" by *Boeing Company v. Shipman, supra.* In *Robinson v. Zapata Corp.*, 664 F.2d 45, (5th Cir. 1981), a Jones Act action, the Fifth Circuit states that "the standard to be applied to a Jones Act claim is more stringent. The [trial] court may direct a verdict or grant a judgment n.o.v. on a Jones Act claim only when there is a *complete absence* of probative facts supporting the non-movant's position. (emphasis by the Court) [citations omitted]."[19]

Hence, the stricter standard of review applied by the Second and Fifth Circuits in requiring a "complete absence of probative evidence to support a verdict"[20] before a directed verdict or judgment n.o.v. will be granted in Jones Act actions is also applied to §905(b) actions by the Second Circuit. This is contrary to the Fifth Circuit standard of review for §905(b) actions stated in *Boeing* and *Doucet* which require examination of all of the evidence in the light most favorable to the non-movant and "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the

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[18] 618 F.2d, at 168. See text at notes 13-16.

[19] 664 F.2d, at 47.

[20] *Id.*, and 423 F.2d, at 959.

case submitted to the jury."[21]

The Second and Fifth Circuits are thus applying inconsistent standards of review in §905(b) actions. The Second Circuit allows a directed verdict or judgment n.o.v. only when there is a "complete absence of probative evidence to support a verdict".[22] In the Fifth Circuit, the standard of reviewing decisions on these motions is that only "if there is substantial evidence opposed to the motion" will such motion be denied.[23] "A mere scintilla of evidence is insufficient to present a question for the jury"[24] in the Fifth Circuit.

That the Second Circuit requires a stricter standard of review in §905(b) cases than does the Fifth Circuit, because the former applies the traditional Jones Act standard to §905(b) actions, is further illustrated by the recent case of *Dabbi v. United Overseas Export Lines, Inc., etc.*, 674 F.2d 175 (2d Cir. 1982). There, the Second Circuit affirmed a judgment n.o.v. for the defendant vessel owner in a §905(b) action where the trial court had ruled that "on the basis of the uncontroverted evidence, [the plaintiff's] version of the accident was a physical impossibility."[25] The Court went on to say that in such a case, "reasonable and fair-minded men could only find for defendant,"[26] citing

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[21] 683 F.2d, at 889 fnt. 2.

[22] *Mattivi v. South African Marine Corp., "Huguenot", supra*, at 167-168 citing *Armstrong v. Commerce Tankers Corp., supra*, at 959.

[23] *Doucet v. Diamond M Drilling Co., supra*, at 889 fnt. 2.

[24] *Id.*

[25] 674 F.2d, at 177.

[26] *Id.*

Mattivi, supra. Thus, when evidence presented by the nonmovant is "physically impossible", it seems that there is a "complete absence of probative evidence to support a verdict" and the Second Circuit will necessarily allow a judgment n.o.v.

At first blush, the standards of review applied by the Second and Fifth Circuits do not appear to be in conflict because of their similar phraseology. The second prong of the *Mattivi* standard of review states that "or (2) [if] there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded men could not arrive at a verdict against him"[27] the directed verdict or judgment n.o.v. will be granted. This is very similar to the Fifth Circuit's requirement of more than a "mere scintilla of evidence" to deny such motions, as a "mere scintilla" would not be enough evidence in the Second Circuit to counterbalance the "overwhelming evidence in favor of the movant...", entitling movant to the directed verdict or judgment n.o.v.

However, the *Mattivi* court stated that "the trial court...correctly concluded that given the *complete absence of substantial evidence supporting the verdict* the jury's finding could only have been the result of sheer surmise and conjecture." (emphasis added).[28] Thus, *Mattivi* utilized only the first alternative of its two-pronged standard of review in a §905(b) action, which is the stricter standard of review used by both the Second and Fifth Circuits in reviewing the evidence in Jones Act actions. Therefore, the use of this standard of review in *Mattivi* implies that had there been evidence to support the verdict, the entry of

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[27] 618 F.2d, at 168.

[28] *Id.*, at 169.

judgment n.o.v. would have been reversed by the Second Circuit. Conflicting standards of review are utilized by the Second and Fifth Circuits, despite some ostensible similarities in the phrasing of the standards.

Finally, the Ninth Circuit offers a third standard of review in §905(b) actions. In *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied* U.S. S.Ct. (Nov. 1, 1982, Docket No. 81-2349), the Ninth Circuit stated: "This court will not disturb a jury's verdict 'unless we find that the evidence was insufficient as a matter of law to support [the] verdict—that the evidence was such that no reasonable man would accept it as adequate to establish the existence of each fact essential to liability.' [quoting from] *Kunz v. Utah Power and Light Co.*, 526 F.2d 500, 504 (9th Cir. 1975)."[29] The Court went on to hold "that the evidence taken together was sufficient to support the jury's verdict for plaintiff, and that the magistrate erred in giving judgment n.o.v. to defendants [vessel owners]."[30] Thus, the Ninth Circuit utilizes a strict standard of review for §905(b) cases in that the evidence must be "such that no reasonable man would accept it" before the Court will allow a jury verdict to be negated, in contrast to the relatively broader standard applied by the Fifth Circuit in *Doucet, supra*, and the apparently stricter standard applied by the Second Circuit in *Mattivi, supra*.

Conflicts between the Circuit Courts as to the stand-

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[29] 651 F.2d, at 1304.

[30] *Id.*, at 1305.

ard of reviewing the sufficiency of the evidence necessary to support a jury's verdict are not limited to §905(b) actions. As evidenced by two very recent cases where certiorari was denied by this Court, this conflict is a significant problem in other areas of law as well. Justice White succinctly explained this in his dissent to the denial of certiorari in two cases decided on the same date, *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-277) and *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation, et al.*, __ F.2d __ (2d Cir. 1982), *cert. denied* U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-362). Justice White stated: "Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. See 9 Wright & Miller, Federal Practice & Procedure §2529, at 572. *Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest.*" (emphasis added).[31]

B. THE LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT SHOWS THAT APPLICATION OF CONFLICTING STANDARDS OF REVIEW BY VARIOUS COURTS OF APPEALS VIOLATES THE CONGRESS' MANDATE.

The 1972 Amendments to the Act were part of a

[31] *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied* U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-277) (White, J., dissenting); *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation, et al.*, __ F.2d __ (2d Cir. 1982), *cert. denied* U.S. S.Ct. (Nov. 8, 1982, Docket No. 82-362) (White, J., dissenting).

comprehensive plan "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms."[32] The Senate Committee emphasized in its report to the 1972 Amendments that safety to the longshoreman was a prime motivation for the amendments. "It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry...[which includes] a workmen's compensation system which maximizes industry's motivation to bring about such an improvement."[33] The Senate Committee intended and provided that longshoremen "retain the right to recover damages for negligence against the vessel".[34] The Committee went on to say that

> "[p]ermitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition".[35]

Therefore, §905(b), as added to the Act in 1972, was a reaction to "intolerable conditions" in the industry which

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[32] S. Rep. No. 92-1125, 92nd Congress, 2d Session, at 1 (1972). See also fnt. 1, supra, of text.

[33] Senate Rep., at 2.

[34] *Id.*, at 10.

[35] *Id.*

would insure that longshoremen are to "retain the right to recover" for a vessel's negligence which causes them injury. Finally, the Senate Committee stated that: "the negligence remedy authorized in the bill shall [not] be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law".[36]

Thus, because of the nature of the longshoreman's occupation which "remains one of the most hazardous types of occupations..."[37] and the expressed purpose of the Committee to improve "intolerable conditions", this Court endeavored in its landmark decision in *Scindia, supra*, to define what due care is owed to the longshoreman by the vessel. However, even though the question of the due care owed by the vessel is presumably settled by *Scindia*, the application of its principles have been greatly affected by the conflict between the federal courts of appeals as to what standard of review should be utilized in determining whether the evidence adduced proves negligence of the vessel. A reiteration of Justice White's dissent previously quoted from concisely states the significance of this issue: "Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest".[38]

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[36] *Id.*, at 12.

[37] *Id.*

[38] *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America, supra* and *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation, et al., supra*, at note 31.

It is respectfully submitted that in order to further the policies of Congress in amending the Act, and to establish a uniform application of *Scindia* among the circuits, this Court should resolve the conflict among the federal courts of appeals as to the standard of review in §905(b) actions. A review of the cases previously cited demonstrating the conflict among the federal courts of appeals reveals the varying outcomes of longshoremen's third-party actions against vessels and demonstrates the need for this Court to provide a uniform standard of review in §905(b) actions.

II. THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION MANDATES THAT THIS COURT ESTABLISH A STANDARD OF REVIEW IN §905(b) CASES FOR ALL OF THE CIRCUITS TO FOLLOW.

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." A judgment n.o.v., although it usually requires a re-examination of the record by a "Court of the United States", is not a violation of the right to trial by jury so as to be made unconstitutional by this amendment. As the *Mattivi* panel noted: "The constitutionality of directed verdicts and judgments n.o.v. is well established. *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943), settled the constitutionality of directed verdicts, and *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935), as supplemented by *Neely v. Martin K. Eby Construction Co.*,

386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), established the constitutionality of judgment n.o.v."[39]

However, this is not to say that the federal courts of appeals can re-determine facts found by the jury or substitute their own judgment for that of the jury on fact questions. As the *Doucet* court itself reiterated: "However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (footnote omitted)".[40]

This Court has time and again affirmed that it is for the jury to decide questions of fact and it is for the courts to decide questions of law. Indeed in *Baltimore & Carolina Line, Inc. v. Redman*, Justice Van Devanter stated: "The aim of the [seventh] amendment, as this court has held, is to...retain the common-law distinction between the province of the court and that of the jury, whereby, ... issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court [footnotes omitted]".[41]

In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), *re-hearing denied* 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284, *motion denied* 371 U.S. 803, 83 S.Ct. 15, 9 L.Ed.2d 51 (a negligence action by a longshoreman against a vessel owner now established by statute as a "§905(b) action"), this Court affirmatively enunciated that "neither

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[39] 618 F.2d, at 167 n.3.

[40] 683 F.2d, at 890 n.2.

[41] 295 U.S., at 657, 55 S.Ct., at 891.

[the Supreme Court] nor the Court of Appeals can re-determine facts found by the jury any more than the District Court can pre-determine them...",[42] based on the seventh amendment's admonition that "no fact tried by a jury, shall be otherwise re-examined...."

Thus, the seventh amendment "fashions 'the federal policy favoring jury decisions of disputed fact question.' *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525, 538, 539, 78 S.Ct. 893, 901, 2 L.Ed.2d 953."[43]

Therefore, an appellate court should not substitute its own judgment on questions of fact for that of the jury's judgment where there is any evidence to support a jury's verdict. To do so would require the court to judge credibility and weigh evidence, a function reserved to the jury by the seventh amendment.

This Court should adopt a standard of review applicable to grants or denials of judgments n.o.v. in §905(b) actions requiring the jury's verdict to be upheld whenever there is any evidence to support it. Without such a uniform standard of review, federal courts of appeals utilizing a broader standard of review, such as that applied in *Doucet*, invade the province of the jury reserved to it by the seventh amendment.

CONCLUSION

For the reasons stated, *amicus* respectfully prays that the judgment of the Fifth Circuit Court of Appeals

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[42] 369 U.S., at 358, 359, 82 S.Ct., at 783.

[43] *Id.*, at 360, *Id.*, at 784.

be reversed and that the judgment of the trial court be reinstated.

Respectfully submitted:

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January _____, 1983.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to all attorneys of record by depositing the same in the United States Mail, first-class postage prepaid and properly addressed to the said attorneys.

Baton Rouge, Louisiana this_____day of January, 1983.

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